

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SALEM HOSPITAL CORPORATION
a/k/a THE MEMORIAL HOSPITAL OF
SALEM COUNTY

and

Case 4-CA-64458

HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES (HPAE)

William Slack, Esq.,
for the General Counsel.
Kaitlin Brundage, Esq.,
for the Respondent.
Lisa Leshinski, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on March 5, 2012, in Philadelphia, Pennsylvania. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide information to the Charging Party Union (the Union), which was the certified bargaining representative of an appropriate unit of its employees. The Respondent filed an answer, later amended, denying the essential allegations in the complaint and asserting that the Board's earlier certification of the Union was erroneous.

After the close of the hearing¹, the parties submitted briefs, which I have read and considered. Based on the entire record in the case, I make the following:

¹ I make the following corrections to the transcript: At page 6, line 18, the word "record" should be deleted and the word "hearing" should be substituted; commas should be added after the word "call" and after the word "e-mail" at line 19 of page 6; at line 23 of page 6, the word "point" should be deleted and the word "under" should be substituted; at page 8, line 11, the word "Or" should be substituted for the word "Nor" and "have raised" should be substituted for "it raise;" at page 11, line 8, the word "matter" should be substituted for the word "method;" and, at page 12, line 22, the word "proofs" should be "proof."

Findings of Fact

I. Jurisdiction

The Respondent, a New Jersey corporation with a facility in Salem, New Jersey, is engaged in the operation of an acute care hospital. During a representative 1-year period, Respondent received gross revenues in excess of \$250,000 and purchased and received goods at its hospital valued in excess of \$50,000 directly from points outside the State of New Jersey. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and is a healthcare institution within the meaning of Section 2(14) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

After extensive proceedings in a representation case involving the Union and Respondent (Case No. 4-RC-21697), on August 3, 2011, the Board issued a decision and certification of representative concluding that the Union was the exclusive collective bargaining representative of the Respondent's employees in the following appropriate unit:

All full-time, regular part-time and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge nurses, employed by the [Respondent] at the Memorial Hospital of Salem County located at Woodstown Road, Salem, New Jersey, excluding all other employees, managers, guards and supervisors as defined in the Act.

The Union had won a Board-conducted election held on September 1 and 2, 2010, and the Board rejected Respondent's objections to the conduct of that election (GC Exh. 2).²

On August 15, 2011, the Union's staff representative, Sandra Lane, wrote a letter to Respondent's interim chief executive officer, Richard Grogan, requesting information from the Respondent in advance of contract negotiations, which she asked to be scheduled later in the year. The information request included such items as a list of employees, with rates of pay, hours, benefits and other related matters. It also included

² Respondent subsequently refused the Union's request to bargain based on the Board's certification. The Board found that such refusal violated Section 8(a)(5) and (1) of the Act. See Board's decision reported at 357 NLRB No. 119 (November 29, 2011) (Case No. 4-CA-64455). The Respondent has filed a petition to review that decision and the matter is pending, I am advised, in the U.S. Court of Appeals for the D.C. Circuit.

items such as hours and other information with respect to agency staff, that is, contract employees, who performed the same type of work as employees in the unit represented by the Union. The complete information request was as follows:

A. Bargaining Unit Information:

Please provide in a Microsoft Excel File (or similar spreadsheet program) a list of current bargaining unit employees by first and last name. For each employee, please include:

- Date of Hire
 - Years of accredited RN experience as of August 1, 2011
 - Unit/Department
 - Status (i.e. Full Time, Part Time, PRN/Per Diem)
 - Base rate of pay
 - Scheduled hours and shift per week
 - Total earnings for 2010 and 2011 to date
 - Total hours worked in 2010 and 2011 to date
 - Regular hours worked 2010 and 2011 to date
 - Overtime hours worked 2010 and 2011 to date
 - On call hours worked 2010 and 2011 to date
 - Shift differential payments 2010 and 2011 to date
 - PTO accrual at present for eligible employees
1. Total costs for the following items for 2010 and 2011 to present:
 - On-call pay
 - PTO paid for eligible employees
 - Shift differential payments
 - Education payments
 2. Total number of hours worked by Agency staff for 2011 to present broken down by department.
 3. A list of all agency staff currently working and a copy of their contracts.
 4. The total number of hours worked by bargaining unit employees 2011 to present.
 5. A list of vacant positions in each job title as of August 1, 2011
 6. A list of all exempt employees
 7. A list of all departments that have on-call

B. Pension and Benefits

1. A list of current employees participating in the 401(k) plan, including the employee's Annual Earnings, contributions made by each employee, and the employer match for 2010 and 2011 to present.
2. Employee and employer payments for health and/or dental insurance, premium cost per eligible employee, and status

C. Staffing

1. Please provide a copy of any policies
2. Copy of any and all acuity systems and guidelines used to staff
3. Process by which staffing is done
4. Staffing grids for each department

D. Employer Policies

1. Copy of all policy and procedure manuals.

According to Union Representative Lane, the information requested concerning the unit employees as well as the contract employees would enable the Union to negotiate contract terms to preserve and protect unit work. Tr. 20-24.

On August 17, 2011, Grogan responded by stating that Respondent would contest the certification because of objections to the Board election. Therefore, Grogan added, Respondent was declining to meet and bargain with the Union.

There were no further communications between the parties and the Union never received the information it requested.

B. Discussion and Analysis**1. Procedural Issue**

The Respondent sought, in this case, to make a collateral attack on the Board's certification by asserting that the election in which its employees chose the Union was held in an inappropriate unit. In support of that effort, Respondent made an offer of proof, which I rejected, that it would "elicit information regarding the eroding effect of the Board's decision" in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (August 26, 2011) upon the Board's Healthcare Rule (284 NLRB 1576 (1987)), which the Board applied to the Respondent in the representation case (Respondent's Rejected Exhibit 1 at fourth unpaginated page). It is, of course, well settled that, in the absence of newly discovered or previously unavailable evidence or special circumstances, an employer may not relitigate issues in a subsequent unfair labor practice proceeding that were or could have been raised in a prior representation case. See *Pace University v. NLRB*, 514 F.3d 19, 23-25 (D.C. Cir., 2008); *Dexter Fastener Technologies*, 321 NLRB 612 (1996), *enfd.* 145 F.3d 1330 (6th Cir. 1998) (information case); *Keauhou Beach Hotel*, 298 NLRB 702 (1990) (same).

Respondent points to no newly discovered factual evidence bearing on relevant unit issues that would not have been available in the representation hearing. There is thus no basis to warrant relitigation of unit issues that were or could have been presented in the representation proceeding in this, a separate and distinct unfair labor practice hearing involving a refusal to provide information. Rather, Respondent essentially argues that the Board should apply *Specialty Healthcare*, which dealt with units in nursing homes or nonacute health institutions, to situations involving acute care

hospitals, like Respondent, which are covered under the Board's Healthcare rules. An assertion that the Board ought to change existing law does not amount to special circumstances in the context presented here, and the Respondent cites no cases that hold otherwise.³

Indeed, the Respondent made or could have made the same assertion in the certification Section 8(a)(5) case that is presently pending before the Court of Appeals. (4-CA-64455; 357 NLRB No. 19, cited above).⁴ Even though *Specialty Healthcare* was issued after the Board issued the certification in the representation case, it appears that Respondent made essentially the same argument to the Board in the representation proceeding that led to the certification Section 8(a)(5) case. For example, it did argue that the Healthcare rules for acute care hospitals, such as the Respondent here, were contrary to the Act and thus invalid. See Regional Director's decision and direction of election in Case 4-RC-21697 (August 2, 2010). Even after the issuance of the *Specialty Healthcare* decision, the Respondent apparently did not raise the issuance of that decision in a motion for reconsideration of the Board's representation-case decision and certification of representative. Nor did it raise the matter in the subsequent Section 8(a)(5) refusal to bargain case, which was based on the certification issued in the representation case. Thus, nowhere in Respondent's response to the Board's notice to show cause in the certification Section 8(a)(5) case did Respondent raise the *Specialty Healthcare* argument, even though it raised other arguments attacking the election results in the representation case (Employer/Respondent's response to Board's notice to show cause and cross-motion to dismiss complaint in Case No. 4-CA-64455, dated October 27, 2011; see also 357 NLRB No. 19, at slip op. 1, fns. 2, 3 and 5). In any event, the assertion that an intervening Board decision, which, on its face, does not affect unit determinations in this case, should arguably be extended to change the law governing acute care hospitals does not amount to special circumstances warranting a relitigation of representation case issues here. Furthermore, as Respondent's counsel conceded at the hearing in this case (Tr. 11), Respondent will be raising its *Specialty Healthcare* argument before the Court of Appeals on review of the certification Section 8(a)(5) case. If the argument is to be considered at all, that is where it should be considered.

In these circumstances, Respondent's procedural contention, which attacks the Board certification and the underlying unit determination in the representation case, is unpersuasive and does not provide a defense in this case. I adhere to my ruling rejecting Respondent's offer of proof.

2. The Information Request

An employer violates Section 8(a)(5) and (1) of the Act when it fails or refuses to provide information needed by the bargaining representative of its employees in

³ To the extent that Respondent asks for a change in Board law, I am not authorized to address that issue, which is for the Board itself to decide. See *Waco, Inc.*, 273 NLRB 746, 749 n. 14 (1984).

⁴ I have accepted Respondent's offer to consult the records in the representation case and the unfair labor practice case based on that representation case. See Respondent's brief at pp. 7-8.

contract negotiations or administration. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956). Information pertaining to employees in the bargaining unit is presumptively relevant. When information pertains to nonunit matters, the burden to show relevance is “not exceptionally heavy.” And the Board uses a “broad discovery-type of standard” in assessing relevance in information requests. *Alcan Rolled Products*, 358 NLRB No. 11, slip op. at 4 (2012), citing and quoting applicable authorities.

The Union’s request in this case mostly involved information pertaining to employees in the bargaining unit and thus was presumptively relevant. Similar requests have been found presumptively relevant. See *Piggly Wiggly Midwest*, 357 NLRB No. 191, slip op. 2 (2012); *Essex Valley Visiting Nurses Assn.*, 353 NLRB 1044, 1050 (2009); *U.S. Information Services*, 341 NLRB 988 (2004); *Dexter Fastener Technologies*, supra, 321 NLRB at 612-613; *Pavilion at Forrestal Nursing & Rehabilitation*, 346 NLRB 458, 462-463 (2006); and *Beverly Health and Rehabilitation Services, Inc.*, 328 NLRB 885, 888 (1999).

The Union also asked for information about the hours, wages and working conditions of contract employees used by Respondent to work side by side with unit employees. Union Representative Lane testified about the need for such information in order for the Union to bargain effectively for the employees it represents. Respondent offered no evidence to rebut Lane’s testimony or to show lack of relevance. Clearly, such information is necessary for the Union to bargain effectively over the wages, hours and working condition for the unit employees it represents. See *Pavilion at Forrestal Nursing*, supra; and *St. George Warehouse, Inc.*, 341 NLRB 904, 925 (2004) enf’d. 420 F.3d 294 (3rd Cir. 2005).

Thus, I find that the Union’s entire information request met the Board’s standards for relevance and the information should have been provided.

In its answer to the complaint and again in its brief, the Respondent asserts that the Union’s information request was overly broad, burdensome and asked for confidential information. However, Respondent did not raise these matters in its response to the Union’s information request in order to give the Union an opportunity to answer legitimate concerns. It simply refused to provide the information. And it submitted no evidence at the hearing in support of its bald and conclusory assertions. In these circumstances, the Respondent cannot be heard to complain about the alleged breadth, burdensomeness and confidentiality of the information. As the Board has stated with respect to confidentiality concerns, the party asserting those concerns in an information case, “may not simply refuse to furnish the requested information, but must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party.” *Alcan Rolled Products*, supra, slip op. 5, citing authorities. See also *Martin Marietta Energy Systems*, 316 NLRB 868, 869 n. 6 (1995) (burden on employer to show burdensomeness); *Honda of Hayward*, 314 NLRB 443, 450 n. 6 (1994) (burden on employer to raise broadness issue in reply to information request).

In any case, I find no merit in Respondent’s assertions in this respect. It submitted no evidence at the hearing to support its assertions, as to which it has the

burden of proof. The information requests were neither too broad nor too burdensome to produce. See *Martin Marietta*, supra; and *Jacksonville Area Association for Retarded Citizens*, 316 NLRB 338, 340 (1995). With particular reference to assertions of confidentiality, the Board has clearly stated that confidential information is limited to certain specified situations, none of which are present in this case. See *Alcan Rolled Products*, supra, slip op. 5. And, as indicated above, the Union asked for material that traditionally has been required to be produced.

In these circumstances, I find that Respondent's failure and refusal to provide the information requested by the Union amounted to a violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. By failing and refusing to provide the information requested by the Union in its August 15, 2011, letter, Respondent has violated Section 8(a)(5) and (1) of the Act.

2. The above violation is an unfair labor practice within the meaning of the Act.

Remedy

Having found that the Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to provide information to the Union that is relevant and necessary to its role as the exclusive bargaining representative of the employees in the following unit:

All full-time, regular part-time and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge nurses, employed by the Respondent at the Memorial Hospital of Salem County located at Woodstown Road, Salem, New Jersey, excluding

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

all other employees, managers, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Furnish the Union with the information it requested on August 15, 2011.

(b) Within 14 days after service by the Region, post at its facility in Salem, New Jersey, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since August 15, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 17, 2012

Robert A. Giannasi
Administrative Law Judge

⁶ If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to provide information to the Union (Health Professionals and Allied Employees (HPAE)) that is relevant and necessary to its role as the exclusive bargaining representative of the employees in the following unit:

All full-time, regular part-time and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge nurses, employed by the Respondent at the Memorial Hospital of Salem County located at Woodstown Road, Salem, New Jersey, excluding all other employees, managers, guards and supervisors as defined in the Act.

WE WILL furnish the Union with the information it requested on August 15, 2011.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SALEM HOSPITAL CORPORATION
a/k/a THE MEMORIAL HOSPITAL OF
SALEM COUNTY

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404
(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.